## Points Involved.

I.

Where an attachment is levied upon personal property in a proceeding *in rem*, and others than the debtor are brought on the record as parties defendant under statutory authority and compelled to assert their adverse interests and do assert paramount title to the attached property, and pending the determination of the question of ownership the defendant debtor secures an order dismissing the entire proceeding for want of jurisdiction, are the adverse claimants to the property necessary parties to proceedings in the appellate court which supersede such order of dismissal and seek to have it reversed?

II.

If the trial court in fact had no jurisdiction, but placed its ruling to that effect upon a wrong reason, can the appellate court uphold such ruling upon correct reasons without a cross-assignment of errors?

III.

If the debtor's interest in the attached personalty never was more than that of a conditional vendee, and the record conclusively shows the property to have been in the possession of the vendor, the condition not performed, and that the vendee had transferred all his interest therein to another previous to the levy, will the seizure authorize service of summons by publication upon the defendant, who is a non-resident?

IV.

Is it competent for the legislature of the Territory of Oklahoma to authorize service of summons upon non-residents of the Territory by publication under the restrictions of section ten of the organic act of the Territory?

V.

Can the legislature of the Territory enact a valid law authorizing the probate judge to make an order in the district court in the absence of the judge of such court granting an attachment in an action brought therein upon a demand before the same is due?

VI.

Is a statute which authorizes attachments upon debts before due upon an affidavit that the debtor is fraudulently disposing of his property, and an order of the court or judge awarding the same which requires the giving of a bond to secure the defendant in his damages if it be wrongfully sued out, if such defendant be a resident of the Terrritory, as a condition to the validity of the writ, and which exempts the plaintiff from giving such bond if the defendant be a non-resident of the Territory, violative of the civil-rights amendment to the Constitution and the acts of Congress passed for the purpose of enforcing its provisions?

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1898.**

*No. 145.*

THE CENTRAL LOAN AND TRUST COMPANY,
PLAINTIFF IN ERROR AND APPELLANT,

*vs.*

THE CAMPBELL COMMISSION COMPANY, DEFENDANT IN ERROR AND APPELLEE.

## BRIEF OF DEFENDANT.

### ADDITIONAL STATEMENT OF FACT.

In addition to the facts stated in brief of appellant, we have to suggest the following, which may have some bearing upon the case:

The action was originally instituted in the district court of Noble county, Oklahoma Territory, on the 2d day of July, 1895. On the 3d day of July, 1895, the sheriff shows by his return that the property was levied upon by him on said date and appraised at the sum of twenty-five dollars per head, as near as could be ascertained, five thousand head of

steers in a certain pasture in the Ponca Indian reservation, same being the only cattle in such pasture, except sixty head belonging to James Harris, and giving the brand of the cattle and no other or further description.

The sheriff shows in his return (see Record, page 12) that he holds the said property in his custody subject to the order of the court, and that he delivered the property to —— ——, in whose possession it was found upon execution by such person, in my presence, of the undertaking herewith.

No undertaking appears in the record, nor does it show when the sheriff filed his return. Afterwards, on the 6th day of July, 1898, and after the attempted levy had been made on this property, the defendant filed an affidavit for garnishment against A. H. Pierce (see Record, page 13), and on the 8th day of July, 1895, a garnishment summons was filed in said cause, showing that it had been served on Pierce on the 6th day of July, 1895.

Subsequently Pierce filed his answer as garnishee by which he stated that prior to July 6, 1895, the garnishee received notice that an assignment had been made of the contract of purchase between himself and the Campbell Commission Company to one T. A. Stoddard, as trustee, and setting out the words of the assignment, which is dated July 1, 1895; and the answer continues, after quoting this instrument of assignment, as follows:

"Said garnishee, A. H. Pierce, is informed and so charged that by reason and in virtue of the said assignment of the right, title and interest of the said Campbell Commission Company of, in and to said contract, whatever the same may have been at the time of said assignment, vested, became transferred to and is now owned and held by said Stoddard as such trustee."

The contract between Pierce and the Campbell Commission Company is set out in full in the answer of the garnishee on pages 19 to 21, inclusive, and is also again exhibited in

the statement under oath made by the plaintiff in its application for the appointment of a receiver, pages 25 to 26, inclusive, in which application the status of Pierce as vendor in a conditional sale is admitted.

The contract referred to is a contract between Pierce and the Campbell Commission Company, dated the 8th day of September, 1894, and is an agreement to sell five thousand head of steers at an agreed price of $15 per head, and that the vendee, the Campbell Commission Company, should care for same in its own pastures in the Indian Territory and ship same to market for the account of the vendor until he should receive and the same should be paid for at the rate of $15 per head. It was also stipulated that the ownership of the steers was to remain in the vendor until the full payment of the purchase price.

Pierce, the vendor, was in possession of the property at the time of its attempted seizure under his contract for the protection of his rights in the property. At the date of the attachment and garnishment proceedings there never had been paid on the purchase price of the cattle any sum except five thousand dollars paid at the time of the original purchase, and there was due on the contract seventy thousand three hundred and thirty dollars ($70,330), with accrued interest, from the Campbell Commission Company to Pierce.

The property attempted to be attached and that attempted to be garnished is one and the same property. There is no dispute as to Pierce's interest in the property being that of a vendor in a conditional sale in possession of the property, and that the purchase price remained unpaid.

## ARGUMENT.

### I.

*Neither this court nor the court below has jurisdiction in this proceeding on account of the omission to make Stoddard, Pierce, and Miller and Son parties to the proceedings.*

In this connection we refer the court specifically to the motion on file to dismiss upon this ground continued to final hearing; also to—

Hughes *vs.* Miller (Kans.), 42 Pac., 696.
Norton *vs.* Wood (Kans.), 40 Pac., 911.
Paving Co. *vs.* Botsford, 50 Kans., 331.
Steel *vs.* Baum, 51 Kans., 165.
Loan Co. *vs.* Lumber Co., 53 Kans., 637.
Guess *vs.* Briggs, 54 Kans., 32.
Wood *vs.* Staudenmeyer, 42 Pac., 321.
Ferguson *vs.* Smith, 10 Kans., 394.
*Ex parte* Polster, 10 Kans., 204.
Armstrong *vs.* Durland, 11 Kans., 15.
Paper Co. *vs.* Hentig, 31 Kans., 322.
Richardson *vs.* McKine, 20 Kans., 346.
Brown's Appeal, 30 Kans., 331.

We cite this array of Kansas authorities because the Code of Civil Procedure of the Territory of Oklahoma, including appellate practice in the supreme court of the Territory, is literally copied from the Code of Civil Procedure of the State of Kansas, and because the decisions from that State construing that code were adopted with the act and should be resorted to as controlling authorities in the test of the question as to who are necessary parties in the court below.

The action is purely *in rem* (Cooper *vs.* Reynolds, 10

Wall., 308). The omitted parties were forced upon the record as parties in the trial court by the plaintiff, and they each asserted a superior ownership in the *res* to the lien of the plaintiff's attachment, and asserted it to be void because levied upon their property. The principal defendant obtained a ruling that the attachment proceedings are void even as to it, that judgment is superseded by the plaintiff, and appealed to the supreme court of the Territory, to which appellate proceedings the principal defendant is alone a party defendant. The supreme court of the Territory affirmed that ruling, and the case is brought here and the judgment is again superseded. The claimants to the *res* are still left kicking their heels in the trial court, unable to get out and unable to proceed in the cause, while the plaintiff and the principal defendant consume several years litigating the question whether the plaintiff has a status in court which will permit him to question the title of the parties whom they have left behind in the trial court to the *res* involved.

We therefore submit that the case is not properly here for want of parties who would be prejudiced by its reversal.

## II.

*There is no merit in the contention of counsel that if the defendant in error wished to rely upon other grounds than that upon which the motion was ruled in the trial court it should have assigned cross-error in the supreme court of the Territory and in this court.*

No principle seems to be better established than that reviewing courts will not reverse or set aside a correct result based upon a wrong reason. It is equally true that a ruling

of a lower court may be justified upon other grounds than those assigned by the court in making such ruling.

McClung *vs.* Silliman, 6 Wheat., 598.
Penna. R. Co. *vs.* Wabash R. Co., 157 U. S., 225.
Shepherd *vs.* Nabors, 6 Ala., 631.
Borden *vs.* Crook, 131 Ill., 68.
Jeure *vs.* Perkins, 29 Ia., 262.
Ormsby *vs.* Hunton, 3 Bibb., 299.
Kallman *vs.* U. S. Express Co., 3 Kan., 198.
Dudley *vs.* Goddard, 12 S. W. R., 302, 382.
See also Cushing Digest, vol. 3, p. 1196, where the authorities are elaborately collected.

## III.

*The defendant in error is shown by record of the plaintiff's own making to have no attachable interest in the property attempted to be levied upon, and there was, therefore, no basis to make service by publication.*

We feel helpless to add anything to the able presentation of this view found in the opinion of Tarnsey, J., who rendered the opinion of the court below and which is set out on page 63 of the record. The authorities cited in the opinion fully support the doctrine that a vendee in a conditional sale of personal property where the condition has not been complied with has no attachable interest in such property.

Drake on Attachments, sec. 246.
Buckmaster *vs.* Smith, 22 Vt., 203.
McFarland *vs.* Farmer, 42 N. H., 386.
19 Federal R., 760.
Lucas *vs.* Birdsley, 41 Conn., 357.
Bradshaw *vs.* Warner, 54 Ind., 58.
Freeman on Judgts., sec. 124.

Strong *vs.* Taylor, 15 Hill (N. Y.), 325.
Sage *vs.* Slentz, 23 O. St., 1.
Cardinal *vs.* Edwards, 5 Nev., 40.
Harkness *vs.* Russell, 118 U. S., 671.
Carley *vs.* Bertran, 34 N. W. R., 674.
Bailey *vs.* Union Pac. R'y, 17 N. W. R., 567.

## IV.

*The process of foreign attachment and suits against non-residents by constructive service is prohibited by section 10 of the organic act of the Territory, which requires all civil actions to be brought in the county where the defendant may reside or be found.*

The provisions of section 10 of the organic act of the Territory are not unlike the provisions found in the acts defining the jurisdiction of the several circuit courts of the United States, and the construction given to such provisions with respect to foreign attachment process are applicable to the question at bar.

Hollingsworth *vs.* Adams, 2 Dall., 396.
Toland *vs.* Sprague, 12 Pet., 300.
*Ex parte* R'y Co., 103 U. S., 794.

The above cited provision is a novelty in territorial legislation on the part of Congress and seems to clearly preclude and to be clearly intended to preclude the process of foreign attachment and publication service upon non-residents.

V.

*The legislature of the Territory, under its organic act, has no power to devolve the functions of the district court nor its judge on any other persons or tribunal than the regularly appointed judge; otherwise it would still be incompetent to devolve these functions upon the judge of the probate court.*

The act granting a writ of attachment under the circumstances is a judicial and not a ministerial act.

Harrison *vs.* King, 9 Ohio St., 393.
Seidentobf *vs.* Annabil, 6 Neb., 524.
Rayburn *vs.* Bracket, 2 Kans., 227.
Simon *vs.* Steter, 25 Kans., 157.
Morrison *vs.* Lovejoy, 6 Minn., 183.
Guerin *vs.* Hunt, 8 Minn., 477.
Howell *vs.* Muskegon, 88 Mich., 369.
Shinn on Attachments, page 351.

The case in the court below was also a proceeding at *common law* within the grant of exclusive jurisdiction to the district courts.

Brisenden *vs.* Chamberlain, 53 Fed. Rep., 307.
Parsons *vs.* Bedford, 3 Pet., 433.
Gaines *vs.* Fuentes, 92 U. S., 23.
Gordon *vs.* Longest, 16 Pet., 103.
Railway Co. *vs.* Cox, 145 U. S., 495.
Dennick *vs.* Railroad Co., 103 U. S., 11.
Railroad Co. *vs.* Whitton, 13 Wall., 270, 287.
Ellis *vs.* Davis, 109 U. S., 485, 497.
Lackawanna Coal and Iron Co. *vs.* Bates, 56 Fed., 737.
Insurance Co. *vs.* Comstock, 16 Wallace, 258.
U. S. *vs.* La Vengeance, 3 Dall., 297.
Webster *vs.* Read, 11 How., 437.
Kohk *et al. vs.* United States, 91 U. S., 375, 376.

Among the various cases which are held to come within this term "common law and chancery jurisdiction" are the following:

A statutory remedy to remove a cloud upon a title.

Bayerque *vs.* Cohen, 1 McAll., 113.

Clark *vs.* Smith, 13 Peters, 195.

*Ex parte* Biddle, 2 Mason, 422; 3 Fed. Cas., 337.

A statutory action of partition.

Aspen Mining Co. *vs.* Rucker, 28 Fed., 220.

A statutory right to enjoin a tax unknown to equity procedure as administered by the United States courts.

Paine *vs.* Wright, 6 McLean, 325; 18 Fed. Cas., 1011.

In the case of Muster *vs.* Spaulding, 16 McLean, 24; 17 Fed. Cas., 243, the circuit court of the United States took jurisdiction of a statutory action against a sheriff for suffering an escape of a person arrested under a fraudulent debtor's act. Under the same statute granting jurisdiction to the circuit courts of the United States, in the case of Grant *vs.* Hamilton, the circuit court of the United States took jurisdiction of a case to recover back money wagered at a play under a statute in derogation of the common law.

Supplemental proceedings under a statute, where distinct from original judgment, may be removed into the Federal courts.

Action for wrongful death under a statute.

Davis *vs.* Laffert, 12 Fed., 353.

Holme *vs.* O. & C. R'y Co., 5 Fed. Rep., 75.

Of an action to cancel an assignment, created by statute.

Jeffry *vs.* Brown, 29 Fed., 476.

Birnheim *vs.* Birnbaum, 30 Fed., 885.

A proceeding by a railroad company for condemnation of land (124 U. S., 197).

See also Peeler, Law and Equity of United States Courts, page 35.

The courts have construed the grant of jurisdiction to territorial district courts under the terms "common law" and "chancery jurisdiction" to mean the determination of all legal actions, whether they arise under the common law or by statutory legal remedies. Thus in *Yearin vs. Spears* (Utah), 10 Pac., 610, it is said:

"The organic act of the Territory (9 Statutes at Large, 453, sec. 9) provides that the said supreme and district courts respectively shall possess chancery as well as common-law jurisdiction, and the Supreme Court of the United States says that this language includes almost every matter, whether of civil or criminal cognizance which can be litigated in a court of justice."

In the case of *Browning vs. Browning* (N. M.), 9 Pac., 677, it was held that this grant of jurisdiction at common law and in chancery conferred jurisdiction upon the district court to administer the Spanish law, which the common law had not superseded in that Territory. And in passing on the case the court say:

"The just interpretation of the section under review is that it created courts of general jurisdiction in which all rights of persons and things, whether arising under the civil law as it obtained in Mexico prior to the treaty of cession or under the common law, the acts of Congress or the statutes of the Territory, should be protected and enforced," citing *Ferris vs. Higley, Territory vs. Flowers*, 2 Mont., 531.

These decisions are all based upon the naked words "at common law and in equity," and in no instance is there any context which enlarges the meaning of these terms. The following is the clause in the Oklahoma organic act

with that portion italicized not contained in the organic acts of other Territories or in judiciary acts of the Federal courts: "And said circuit and district courts respectively shall possess chancery as well as common-law jurisdiction *and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property.*" We think this equivalent to saying, in express terms, that the district courts shall have jurisdiction at common law, in chancery, and of all statutory rights and remedies. Be that as it may, however, this language as construed in all the acts of Congress by all of the courts of the United States, both with reference to territorial courts and United States courts, points to the fact that this language grants jurisdiction in statutory matters of litigation equally with pure matters of common law, so that the fact that an attachment may or may not be a statutory remedy, it is still embraced within the terms "common law" and "chancery jurisdiction" as used in the organic act.

The supreme court of the Territory overruled the reasoning of the trial court upon the assumption that the attachment process in question is not comprehended in the grant of jurisdiction to the district courts contained in the organic act of the Territory. The following language, found on page 59 of the Record, explains the whole reasoning of the court below:

"The power to issue attachments is not derived from the common law and never was a part of the jurisdiction exercised by the courts of chancery. It is purely of statutory authority and origin."

A statement the correctness of which we do not question. We do deny, however, that the territorial legislature has authority to place the enforcement of such a remedy in any other court or tribunal, when it once creates it, than the district court. The remedy of attachment once given comes within the grant of jurisdiction to such courts just as decidedly as the action of assumpsit always known to the common law.

## VI.

*The organic act of the Territory is its constitution. By that act and other acts of Congress amendatory thereof district courts are created and their jurisdiction defined to comprehend the process in question. The mode of filling the office is also defined by the same laws, both with respect to permanent and temporary incumbency, regular appointment, and temporary substitution in case of absence, sickness, or disqualification. These laws exclude the idea of power in the Territorial Assembly to fill the office of judge of that court for a single instant in any other way for the performance of any judicial act. The degree of substitution being immaterial, so long as it is for the performance of a judicial duty, it is indifferent whether it be for a single order or a term of court.*

The Territorial Assembly in 1891 enacted certain legislation seeking to extend the powers and jurisdiction of probate courts and probate judges in the Territory of Oklahoma, and in view of the decision of this court in *Ferris vs. Higley*, 20 Wallace, 375, recognized its inability to make such legislation effective without the consent of Congress. It was therefore provided that such act should not go into effect until approved and ratified by Congress. This act is set out in full in Appendix No. 1 of this brief.

Subsequently Congress passed an act ratifying the extension of jurisdiction of probate courts and probate judges attempted by the Territorial Assembly.

Chapter 543, section 17, Statutes at Large, volume 26, among other things, provides:

"*Provided*, That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in town-site matters and

under such regulations as are provided by the laws of the State of Kansas."

At the time of the passage of this provision by Congress, the legislature had not attempted to enact any law authorizing probate judges to make orders in the district courts, and the enactment under which the probate judge presumed to act in granting a writ of attachment in the present case forms a part of the present Code of Civil Procedure of the Territory, which took effect upon the 14th day of August, 1893, long after the act of Congress above referred to.

This act of Congress ratified previous extensions of probate judges' power only, and gave no warrant for further future legislation on the part of the Territory further extending the jurisdiction and authority of the probate judges and the probate courts. This law and the act of Congress ratifying the same constitute a very clear legislative construction of the organic act, manifesting the necessity for the consent of Congress to the granting of jurisdiction at law and chancery to probate courts.

There is, therefore, no express authority of Congress for this measure. Can it be exercised under the organic act and the legislation of Congress supplemental thereto?

Section 9 vests the judicial power of the Territory in a supreme court, district courts, probate courts, and justices of the peace, and provides that the associate justices of the supreme court shall be judges of the district court. Section 14 provides that the chief justice and associate justices shall be appointed by the President and confirmed by the Senate.

Section 3 of an act of Congress approved December 21, 1893 (28 U. S. Stats. at Large, p. 20), reads as follows:

"SECTION 3. That the said Territory shall be divided into five judicial districts, and a district court shall be held in each county, as now provided by law. The supreme court of said Territory shall define said judicial districts, and shall fix the time and place at each county-seat in each district where the district court shall be held, and designate the

judge who shall preside therein. Each judge, after assignment, shall reside in the district to which he is assigned. THE SUPREME COURT OF SAID TERRITORY, OR THE CHIEF JUSTICE THEREOF, MAY DESIGNATE ANY JUDGE TO TRY A PARTICULAR CASE OR CASES IN ANY DISTRICT WHEN THE JUDGE OF SAID DISTRICT HAS BEEN OF COUNSEL OR IS OF KIN TO EITHER PARTY TO THE ACTION, OR INTERESTED, OR IS BIASED OR PREJUDICED IN THE CAUSE, OR IF FOR ANY OTHER REASON SAID JUDGE IS UNABLE TO HOLD COURT."

It would seem that a bare reading of these provisions would make it palpable that any attempt on the part of the Territorial Assembly to place any other person in the shoes of the regularly appointed district judge for any purpose pertaining to that office is invalid.

This view, under similar constitutional provisions, is fully upheld by the authorities on principle:

Hoagland *vs.* Creed, 81 Ill., 506.
Cobb *vs.* The People, 84 Ill., 52.
Elliott Gen. Prac., v. 1, sec. 24.
Winchester *vs.* Ayers, 4 Greene (Ia.), 105.
*In re* Gill, 20 Wis., 686.
Chandler *vs.* Nash, 5 Mich., 409.
Harper *vs.* Jacobs, 51 Mo., 296.
Wright *vs.* Boone, 2 Ia., 459.
Bishop *vs.* Nelson, 83 Ill., 601.
Cooley Const. Lim., 6th ed., p. 504.
State *vs.* Noble, 21 N. E. R., 246.

We further submit that a construction of the act enlarging the jurisdiction and powers of the probate judges and the probate courts, wherein there is a specific enumeration of the powers added and which includes the power in single instances to make an order in the absence of the district judge, to wit, the granting of injunctions, which is subsequently merged into an act of Congress by adoption and ratification, as is the case here, by its specific enumeration

of similar powers, excludes the right on the part of the legislature, without the further concurrence of Congress, of additional enlargement of the power of the probate courts and probate judges.

The case of Young *vs.* Lederick, 14 Kans., 78, in which the court below sought to justify its ruling that the probate judge could act as judge of the district court in granting a writ of attachment, is certainly misapplied.

It is true the Kansas supreme court, in *Young vs. Lederick*, held that it was competent for the legislature of that State to pass the identical statute in question here. It will be seen, however, from the language of Mr. Justice Brewer in deciding the case that he based his decision upon the absence of the very constitutional provision there that is present here. His decision rests upon the following language used in the opinion:

"The jurisdiction of the district court is not defined by the Constitution; it is left to the legislature to prescribe its limits and the manner of its exercise."

It is manifest from this premise that had jurisdiction been defined in the Constitution and the mode of supplying the absence of the district judge likewise prescribed, the result reached in *Young vs. Lederick* would have been different.

The question as to whether an extension of the probate judges' jurisdiction, as set out by Appendix No. 1, approved by act of Congress, makes that act an act of Congress, is learnedly discussed in Irwin *vs.* Irwin, 37 Pac. R., 548, and 41 Pac. R., 369, where the conclusion is finally arrived at that this legislation is tantamount to an act of Congress. If that be a correct view, an express enumeration of certain specific powers similar to that sought to be upheld here would certainly preclude the authority of the legislature of the Territory to confer others not enumerated.

If the order of the probate judge is void, as we contend,

the attachment, if otherwise regular, would be a nullity and form no basis for constructive service.

Philpot *vs.* Neuman, 11 Neb., 301; 9 N. W. R., 94.
Drake on Attachments, sec. 33.
Shinn on Attachments, 351.
Powell *vs.* Muskegon, 50 N. W. R., 308.

Under the terms of the statute itself the failure of the attachment defeats the action and compels its dismissal, and even if, as counsel contend, the appearance of the defendant in error had been general the points, which are involved would be equally fatal to the case, whether the appearance was general or special. The attachment having failed, nothing could result under the statute but a dismissal of the case.

But there was no general appearance, nor was the proceeding contested upon any ground except jurisdictional ones.

Counsel are entirely mistaken in their view that a motion to dismiss the case for want of jurisdiction, under a special appearance, on account of defective attachment proceedings, could possibly be construed to be a general appearance. The defendant, The Campbell Commission Company, was a nonresident and no personal service was had upon it, and resting at the very foundation of jurisdiction in the case was the requirement that the court by valid process obtain jurisdiction of its property by a valid actual seizure. See Pennoyer *vs.* Neff, 95 U. S., 716; Rorer on Interstate Law, 124 and 125; Brown on Jurisdiction, section 71, in which the author says:

"A creditor by the seizure becomes a lienholder when the attachment is laid on such property as is liable to seizure, and the lien is created hypothetically dependent upon the confirmation of the attachment, if not set aside *pendente lite*, for because if set aside without the appearance of the defendant, the jurisdiction is gone."

The whole motion of the defendant in error went to the one single proposition, and nothing else, that by reason of various defects in the initial proceedings the court had failed to secure, by a valid process, any jurisdiction or proper control over the *res* in the action, and that the subsequently substituted service by publication was a nullity.

Two steps are essential for the court to acquire jurisdiction: The one is the valid seizure of the property of the defendant; the other is substituted service upon the defendant. The plaintiff did not rest upon its attachment solely, but secured a garnishment process against the same property in the hands of Mr. Pierce, who answered as garnishee, and denied that the defendant, The Campbell Commission Company, had any interest therein. Now, the ground stated in the motion, which the plaintiff in error insists was a general appearance, was a mere reference to the fact that no issue had ever been taken on the answer of the garnishee, and that it was conclusive of the fact that none of defendant's property had been seized; consequently there must be a failure of jurisdiction (*Cooper vs. Reynolds*, 10 Wallace, 308).

The authority cited by counsel to the effect that the appearance of the defendant in error in the case was a general appearance has no bearing whatever on the case, for in order to constitute a general appearance the defendant must file some plea which in effect admits the jurisdiction of the court. That is not true here. Every line and every syllable of the motion denied jurisdiction of the court and went to questions affecting either the power of the court over the *res* or over the person of the defendant in error. We conceive that the true rule is that when a plea is filed by the defendant in an attachment suit, which goes to the truth of and joins issue upon the facts stated in the affidavit for attachment, or which denies the debt or denies the plaintiff's cause of action, then there is a general appearance, no matter what the plea may be called

but if the plea goes to the legality of the service or the legal regularity of the attachment process, either to the affidavit, order awarding the same, or the mode of service of the same, it is not a general appearance, but special. This view is fully upheld by the following authorities:

Belknap *vs.* Charlton, 34 Pac. Rep., 758.
Greenwell *vs.* Greenwell, 26 Kan., 530.
Bury *vs.* Conklin, 23 Kan., 460.
Wood *vs.* Young, 38 Iowa, 102.
Duncan *vs.* Wickliffe, 4 Metc. (Ky.), 118.
1 Drake Attachm., sec. 112.
Glidden *vs.* Packard, 28 Cal., 649.
Johnson *vs.* Buell, 26 Ill., 66.
Bonner *vs.* Brown, 10 La. Ann., 334.
Johnson *vs.* Buell, 26 Ill., 67.
Coffman *vs.* Brandhoffer, 50 N. W. Rep., 6.
Cleghorn *vs.* Waterman, 16 Neb., 226; 20 N. W. Rep., 636, 877.
Petty *vs.* Frick Co. (Virginia) 10 S. E. Rep., 886.
Wynn *vs.* Wyatt's Adm's, 11 Leigh, 534.
Harkness *vs.* Hyde, 98 U. S., 476.
Encycl. Pleading and Practice, vol. 2, 610.

## VII.

*The law exempting the plaintiff from giving an attachment bond in the present case is invalid under the fourteenth amendment to the Constitution.*

It is our contention that a statute which requires a bond to be given when a resident is sued in court upon an attachment proceeding upon the ground of fraudulent disposition of property and dispenses with the same bond when a resident of a foreign State is sued under the same circumstances is invalid under the fourteenth amendment to the Constitu-

tion and under title 24 of the Revised Statutes of the United States, in so far as it attempts to excuse the giving of a bond where the suit is brought against a non-resident, and requires it where the same kind of a suit is brought against a resident.

The first and fifth paragraphs of the fourteenth amendment read as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

* * * * * * *

"*Fifth.* That the Congress shall have power to enforce by appropriate legislative provisions this article."

By section 1977 of the Revised Statutes of the United States it is provided:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

We raise no question of the authority of the legislature of a Territory to dispense with an attachment bond where an action is brought upon a matured obligation against a non-resident where the fact of non-residence under the statute gives the right to attach his property as a necessary preliminary to enforcing his liability thereon in its courts.

In this respect we concede that non residents of the State

are a different class judicially from residents; the fact of non-residence is what gives the remedy as the basis of acquiring jurisdiction in the *quasi* proceedings *in rem*, but when the attachment is given against the non-resident upon the ground that he is fraudulently disposing of his property the distinction that exists between residents and non-residents disappears, and there is no room for treating non-residents by reason of the dissimilar conditions surrounding them as a different class requiring independent legislation. Under this constitutional provision and under the statute enacted in pursuance thereof, above quoted, we conceive the rule to be concurrent with the general rule obtaining with reference to general and special legislation—that is, different provisions and discriminations may be made in the law against non-residents when they fall *sui generis*, but when they are not capable of separate identification from residents by any facts or circumstances other than the fact that they are non-residents—that is, when the fact of non-residence is their only distinguishing feature—the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification; and when the good faith of a non-resident is assailed in his dealings with his property as respects his creditors by attachment proceedings it is impossible to conceive why he should not be entitled as much to the security afforded by a bond in attachment proceedings as in the same proceedings against a resident of the State. We contend that any valid distinction for treating non-residents as a separate class from residents with respect to the law in this particular entirely disappears, and that there is no distinction in fact between the status of the resident and the non-resident when his integrity is assailed by the seizure of his property as the alleged result of fraudulent transactions against his creditors.

Nor it matters not in the present case that the defendant is a foreign corporation, as it is entitled to the full benefit of

both the constitutional amendment and the statute enacted in pursuance thereof.

*Santa Clara Co. vs. Southern Pac. R. R. Co.*, 113 U. S., 394.

It would be hard to conceive, under the terms of section 1977, how the legislature could make a bond the requisite to an attachment on the ground of fraud against a resident and dispense with it in the case of a non-resident without violating that provision of this section which requires that all persons shall have the equal benefit of all laws not only of the United States, but of the State and territorial laws, and of all proceedings for the security of person and property as is accorded by the State to its own citizens.

And indeed it is hard to conceive how the very language of the amendment to the Constitution itself, which provides that no State shall deny any person within its jurisdiction the equal protection of the laws. This constitutional amendment refers not only to persons but to the property, and it certainly means, if it means anything, that that property cannot be taken from it by any sort of process not equally applicable upon the same terms and conditions and upon the same restrictions as against citizens of the Territory, and we believe that the authorities construing this amendment and this statute so clearly recognize this truth in kindred cases that there is no avoiding extending the principle by a parity of reasoning to the case at bar.

See Virginia *vs.* Rives, 100 U. S., 318.
Livestock Ass'n *vs.* Crescent City Co., 1 Abb. U. S., 388.
15 Fed. Cases, 649, No. 8408.
Strouder *vs.* West Va., 100 U. S., 303.
Baker *vs.* State, 54 Wis., 371.
Slaughterhouse cases, 161 Wallace, 106.
*In re* Jacobs, 98 N. Y., 107.
Eastman *vs.* State, 109 Ind., 279.
State *vs.* Goodwill, 10 S. E., 285.

McCullough *vs.* Brown, 19 S. E., 469.
Bush *vs.* Ky., 107 U. S., 110.
*In re* Ah Chong, 2 Fed. Rep., 733.
Neill *vs.* Del., 103 U. S., 370.
Baker *vs.* Portland, 8 Oregon, 356.
Claybrook *vs.* Owensborough, 16 Fed., 297; 23 *id.*, 634.
People *vs.* Gallagher, 93 U. S., 438.
U. S. *vs.* Buntin, 10 Fed., 730.
Pace *vs.* Ala., 106 U. S., 583.
San Mateo Co. *vs.* So. Pac. R. R. Co., 13 Fed., 722.
Boyd *vs.* U. S., 116 U. S., 616.

In all these cases above cited, restrictions and discriminations of a less obnoxious character to the real intent and purport of this constitutional provision have been declared unconstitutional, and when all summed up they come down to the first test: Is there any true basis which the judiciary will recognize as a substantial classification for State legislation affecting non-residence? We contend that in the case at bar there is none. We think the legislature of the Territory had no right or authority under the constitution and civil rights bill to pass a law which would require a bond in attachment based on the ground of a fraudulent transfer of property in the case of residents, and dispense with the bond under precisely the same conditions, except that the defendant is a non-resident.

We therefore respectfully submit that the reason given by the court below for its decision was sound, and that if other reasons are necessary they can easily be found in the additional grounds we have submitted in this brief, and that the ruling of the court below was right.

Respectfully submitted.

JOHN W. SHARTEL,
*Attorney for Defendant in Error and Appellee.*

*Statutes of Oklahoma*, 1890.

(Page 367.)

AN ACT extending the jurisdiction of the probate court in civil and criminal cases and prescribing the procedure therein and providing for appeals therefrom.

(Took effect December 25, 1890.)

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SEC. 1. Probate courts in their respective counties shall, in addition to the powers conferred upon them by the probate chapter of the Territory, have and exercise the ordinary powers and jurisdiction of the justices of the peace and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars exclusive of costs and in action of replevin where the appraised value of the property does not exceed that sum and the provisions of the chapter on civil procedure relative to the justices of the peace and to practice and proceedings in the district courts shall apply to the proceedings in all civil actions prosecuted before said probate courts. *Provided*, that the probate courts shall not have jurisdiction:

First. In any action for malicious prosecution.

Second. In any action against officers for misconduct in office except where like proceedings can be had before a justice of the peace.

Third. In any action for slander and libel.

Fourth. In actions upon contract for sale of real estate.

Fifth. In any matter wherein the title of boundaries of land may be in dispute nor to order or decree the sale or partition of real estate.

SEC. 2. In all cases commenced in said probate courts wherein the sum exceeds the jurisdiction of the justices of the peace, the pleadings and practice and proceedings in said courts, both before and after judgment, shall be governed by the chapter on civil procedure of the Territory governing pleadings and practice and proceedings in the district courts. In all cases commenced in said probate courts that are within the jurisdiction of the justices of the peace, the pleadings and practice and proceedings, both before and after judgment, provided for in the justices' procedure of the

Territory, shall be applicable to the pleadings and practice and proceedings of the said probate courts.

SEC. 3. The probate judge shall on the first day of each term prepare a calendar of the cases standing for trial at said term, placing the cases on said calendar in the order in which the same are numbered on the docket and setting the cases for trial in such order upon convenient days during said term; and the provisions of the chapter on civil procedure of the Territory relative to the docket in district courts shall so far as they are applicable apply to said calendar.

SEC. 4. The probate courts of the Territory shall be deemed to be always open for the filing of papers and the issuance of processes in civil actions and for the purposes of taking and entering judgments by confession for the purpose of trying all actions commenced therein that are triable in the justices' procedure of the Territory and for all probate business of their respective counties.

SEC. 5. Appeals from the final judgment of said probate courts shall be allowed and taken to the supreme court of this Territory in the same manner as (from) the district court and with like effect when only questions of law are involved in the appeal. If questions of fact are to be retried in the appellate court the appeal shall be taken to the district court of the county in manner and form as appeals are taken from judgments of justices of the peace.

SEC. 6. In all cases pending or to be brought in the probate court the probate judge shall have power and jurisdiction to allow injunctions, mandates, writs of prohibition and to make all other and further orders as may be necessary in cases pending in said court and to hear and determine motions made to vacate or modify same and generally to do as to actions pending in said courts any and all acts which the judges of the justices' courts are by law allowed to do. He may also in case of the absence of the district judge from his county allow injunctions in matters about to be brought or pending in the district court, but he shall not have power to vacate or modify same. He shall have power to allow writs of *habeas corpus* in all cases provided by law and to hear and determine the same.

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This act shall be in force and take effect from and after its adoption and legalization by act of Congress.